Chong By Sam & Anor v Soon Tiek Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3–24–1639 OF 2006
MOHD HISHAMUDIN J
20 FEBRUARY 2008

Contract — Sale and purchase of property — Breach — Failure to deliver vacant possession within stipulated time — Entitlement to liquidated damages — Whether vacant possession had been effected by issuance of certificate of practical completion by defendant's architect — Whether plaintiffs' claim statute barred — Limitation Act 1953 s 6(1)

On 8 May 1995 the plaintiffs had entered into a sale and purchase agreement ('SPA') with the defendant, a developer, to purchase a commercial unit ('the unit') which was to be built by the defendant. Clause 24(2) of the SPA provides that there should be delivery of vacant possession within 36 months of the date of the agreement, that is, on or before 8 May 1999 (the completion date), failing which the defendant would be liable to pay the plaintiffs agreed liquidated damages ('LAD'), from the completion date until the date the defendant notifies the plaintiff of delivery of vacant possession of the unit. The unit was not completed on the completion date and the plaintiffs only managed to obtain the certificate of fitness on 2 October 2002. On 24 August 2006, the plaintiffs commenced proceedings by way of an originating summons application claiming LAD for late delivery of vacant possession of the unit amounting to RM98,476.25, calculated as from 8 May 1999 to the date of delivery of possession, 2 October 2002, pursuant to cl 24 of the SPA. The defendant argued that there was delivery of vacant possession on 2 January 1998 because on that date the defendant had issued the plaintiffs with a letter enclosing a document dated 22 December 1997 issued by their architect, which according to the defendant was a certificate of practical completion in respect of the unit as referred to by cl 25 of the SPA. Clause 25 provides that delivery of vacant possession is to be effected by way of the issuance of a certificate by the defendant's architect certifying that the construction of the plaintiffs' unit had been practically completed (the certificate of practical completion). The defendant also adduced an affidavit affirmed by its architect confirming that the document dated 22 December 1997 issued by him was the certificate of practical completion. In addition the defendant in reliance on *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 ('*Insun Development*') submitted that the plaintiffs' claim for LAD was statute barred by s 6(1) of the Limitation Act 1953 ('the Act')

as the plaintiffs' cause of action that accrued on 8 May 1999, the due date of delivery of vacant possession, was filed after a delay of more than seven years after that date.

Held, allowing the application with costs:

(1) The document issued by the architect dated 22 December 1997, was not the certificate of practical completion as envisaged by cl 25.1 of the SPA. The certificate that was meant by cl 25.1 was a certificate issued by the architect that certified that the unit purchased by the plaintiffs was practically completed but the document referred to by the defendant under cover of its letter dated 2 January 1998 did not contain any certification to that effect but was merely as the heading of the letter indicated, a schedule of progress payments (see para 11).

(2) There was an ambiguity as to the true nature of the document that the defendant referred to as the certificate of practical completion because it did not clearly state that it was a certificate as required by cl 25.1 of the SPA. In the instant case, since the defendant was relying on the document that contained an ambiguity, it had to be construed in favour of the plaintiff (see para 14).

(3) In the present case, a certificate of practical completion was never issued by the architect and therefore there was no delivery of vacant possession pursuant to cl 25.1 of the SPA. In the circumstances, delivery of vacant possession only took place after the plaintiffs had been issued with a certificate of fitness, ie on 2 October 2002. Therefore the cause of action could only accrue from 2 October 2002 and was therefore not statute barred under s 6(1) of the Act (see para 19).

(4) Clause 24 of the SPA in the present case had an opening date as well as a closing date and was therefore unlike the clause relating to the time for handing over of vacant possession in *Insun Development* which had only an opening date but no closing date. *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 followed and *Insun Development* not followed (see para 27).

[Bahasa Malaysia summary

Pada 8 Mei 1995 plaintif-plaintif memasuki satu perjanjian jual beli ('perjanjian') dengan defendan, pemaju, untuk membeli satu unit komersial ('unit') yang akan dibina oleh defendan. Klausa 24(2) perjanjian tersebut memperuntukkan bahawa milikan kosong harus diserahkan dalam tempoh 36 bulan dari tarikh perjanjian, iaitu, pada atau sebelum 8 Mei 1999 (tarikh penyelesaian), dan jika gagal defendan akan bertanggungjawab untuk

membayar kepada plaintif-plaintif ganti rugi yang ditetapkan ('LAD'), dari tarikh penyelesaian sehingga tarikh defendan memberitahu plaintif mengenai penyerahan milikan kosong unit tersebut. Unit tersebut tidak diselesaikan pada tarikh penyelesaian dan plaintif-plaintif hanya berjaya memperoleh sijil penghunian pada 2 Oktober 2002. Pada 24 Ogos 2006, plaintif-plaintif memulakan prosiding melalui permohonan saman pemula menuntut LAD untuk penyerahan lewat milikan kosong unit tersebut berjumlah sebanyak RM98,476.25, yang dikira bermula dari 8 Mei 1999 sehingga tarikh penyerahan milikan, 2 Oktober 2002, menurut klausa 24 perjanjian tersebut. Defendan menghujah bahawa terdapat penyerahan milikan kosong pada 2 Januari 1998 kerana pada tarikh tersebut defendan telah mengeluarkan kepada plaintif-plaintif surat yang mengepilkan dokumen bertarikh 22 Disember 1997 dikeluarkan oleh arkitek mereka, yang menurut defendan adalah sijil penyelesaian praktikal berkaitan dengan unit tersebut seperti yang dirujuk di dalam klausa 25 perjanjian. Klausa 25 memperuntukkan bahawa penyerahan milikan kosong adalah sepatutnya dilakukan secara pengeluaran sijil oleh arkitek defendan yang mengesahkan bahawa pembinaan unit plaintif-plaintif telah diselesaikan secara praktikal ('sijil penyelesaian praktikal'). Defendan juga mengemukakan afidavit yang disahkan oleh arkiteknya yang mengesahkan bahawa dokumen yang bertarikh 22 Disember 1997 yang dikeluarkannya adalah sijil penyelesaian praktikal. Selanjutnya defendan dalam menyandar kepada kes *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 ('*Insun Development*') menghujah bahawa tuntutan plaintif-plaintif untuk LAD adalah dihadkan oleh statut di bawah s 6(1) Akta Had Masa 1953 ('Akta') kerana kausa tindakan plaintif-plaintif yang bermula pada 8 Mei 1999, tarikh penyerahan milikan kosong, difailkan selepas kelewatan lebih tujuh tahun selepas tarikh tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Dokumen yang dikeluarkan oleh arkitek bertarikh 22 Disember 1997, bukanlah sijil penyelesaian praktikal seperti yang dikehendaki oleh klausa 25.1 perjanjian. Sijil tersebut yang dimaksudkan oleh klausa 25.1 adalah sijil yang dikeluarkan oleh arkitek yang mengesahkan bahawa unit yang dibeli oleh plaintif-plaintif telah secara praktikalnya diselesaikan tetapi dokumen yang dirujuk oleh defendan di bawah lampiran suratnya yang bertarikh 2 Januari 1998 tidak mengandungi apa-apa pengesahan untuknya tetapi hanyalah semata-mata seperti yang ditunjukkan oleh tajuk surat tersebut, jadual pembayaran kemajuan (lihat perenggan 11).

(2) Terdapat kekaburan mengenai sifat sebenar dokumen yang dirujuk oleh defendan sebagai sijil penyelesaian praktikal kerana ia tidak menyatakan dengan jelas bahawa ia adalah sijil yang dikehendaki oleh klausa 25.1

perjanjian. Di dalam kes ini, oleh sebab defendan menyandar atas dokumen yang mengandungi kekaburan, ia perlu ditafsirkan memihak kepada plaintif-plaintif (lihat perenggan 14).

(3) Di dalam kes ini sijil penyelesaian praktikal tidak pernah dikeluarkan oleh arkitek dan oleh itu tidak ada penyerahan milikan kosong berikutan klausa 25.1 perjanjian. Dalam keadaan ini, penyerahan milikan kosong hanya berlaku selepas plaintif-plaintif diberikan sijil penghunian iaitu pada 2 Oktober 2002. Oleh itu kausa tindakan hanya boleh bermula dari 2 Oktober 2002 dan oleh itu tidak dihadkan oleh statut di bawah s 6(1) Akta (lihat perenggan 19).

(4) Klausa 24 perjanjian di dalam kes ini mempunyai tarikh pembukaan dan tarikh penutupan dan oleh itu tidak seperti klausa yang berkaitan dengan masa untuk menyerahkan milikan kosong di dalam *Insun Developement* yang hanya mempunyai tarikh pembukaan tetapi bukan tarikh penutupan. *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 diikut dan *Insun Development* tidak diikut (lihat perenggan 27).]

Notes

For cases on breach of sale and purchase of property, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4949–4956.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14, SC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 188, FC (not folld)

Kandasami v Mohamed Mustafa [1983] 2 MLJ 85, PC (refd)

Liew Tuo Chee and others v Soon Teik Development Sdn Bhd Originating Summons No S1–24–454 of 2005, (unreported), HC (refd)

Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (folld)

Sri Damansara Sdn Bhd v Liam Ahat Kiat @ Lim Pei Tiam [1997] 3 MLJ 349, HC (distd)

Legislation referred to

Limitation Act 1953 s 6(1)

Hazila bt Moharam (CC Choo & Co) for the plaintiffs.
LS Kok (Henry Lim & Co) for the defendant.

Mohd Hishamudin J:

[1] This originating summons is an application by the plaintiffs against the defendant company for damages ('LAD') for late delivery of vacant possession of a commercial unit in a commercial complex known as Endah Parade built by the defendant/developer; calculated from 8 May 1999 until 2 October 2002 at 10%pa of the purchase price, pursuant to cl 24 of a sale and purchase agreement, amounting to RM98,476.25.

[2] I have allowed the application with costs, and I shall now explain the grounds for my decision.

[3] But first, I shall touch briefly on the background facts. On 8 May 1995 the plaintiff/purchaser entered into a sale and purchase agreement with the defendant/developer for the purchase of a commercial unit in a commercial complex called Endah Parade in Petaling, Kuala Lumpur, which was to be built by the defendant/developer. Under the agreement, the purchase price of the unit was RM289,170. Clause 24(1) of the agreement provides that the defendant/vendor shall deliver vacant possession of the unit to the plaintiff/purchaser within 36 months of the date of the agreement. This means that the delivery of vacant possession was to be on or before 8 May 1999 ('the completion date'). Clause 24(2) provides that in the event the defendant/vendor fails to deliver vacant possession to the plaintiff within the stipulated time, the defendant is to pay the plaintiff liquidated ascertained damages (LAD) to be calculated, day to day at the rate of 10%pa of the purchase price, from the completion date until the date the defendant notifies the plaintiff of delivery of vacant possession of the said unit.

[4] Clause 25 provides the manner in which delivery of vacant possession to the plaintiff/purchaser is to be effected by the defendant. It is to be by way of the issuance of a certificate by the defendant's architect certifying that the construction of the plaintiffs' unit has been practically completed ('the certificate of practical completion'). Clause 25 reads:

> 25 Manner of Delivery of Vacant Possession
>
> 25.1 Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the Property has been practically completed in accordance thereof and provided that the Purchaser shall have paid all monies payable under this Agreement and shall have observed and performed the terms and covenants on his part herein contained, the Vendor shall permit the Purchaser into possession of the Property PROVIDED THAT such possession shall not give the Purchaser the right to occupy the and the Purchaser shall not occupy the Property

A until such time as the Certificate of Fitness for Occupation for the Commercial Complex and/or the Property is issued.

25.2 Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the B Property, whether or not the Purchaser has actually entered into possession or occupation of the Property, the Purchaser shall be deemed to have taken delivery of vacant possession whereupon the Vendor shall cease to be responsible howsoever for any loss or damage to the Property and/or to the fixtures and fittings thereon/therein.

C

[5] It is to be noted that the above cl 25.1 provides that even where delivery of vacant possession has been effected, still the plaintiffs/purchasers were not allowed to occupy their unit unless and until the certificate of fitness for D occupation has been issued by the local authority.

[6] Clause 26 provides that the defendant was to apply for and to obtain the certificate of fitness for occupation from the local authority in respect of the said unit. But there was no time frame prescribed by cl 26 within which E the defendant was to obtain the certificate of fitness from the local authority. Clause 26 stipulates:

26 Vendor to Obtain the Certificate of Fitness for Occupation

F 26.1 The Vendor shall do all acts and things necessary to procure the issuance of the Certificate of Fitness for Occupation in respect of the Property at its own cost and expense, and shall duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the Certificate of Fitness for Occupation in respect of the Property.

G

26.2 If needs be the Vendor its servant or agents shall be entitled at any time after the Purchaser has been granted vacant possession of the Property and prior to the issuance of the Certificate of Fitness for Occupation to make any alterations and/or additions to the Property H as may be required by the Appropriate Authority and the Purchaser shall permit them access into the Property at all reasonable times for such purposes.

26.3 The Purchaser hereby covenants with the Vendor that the Purchaser I will not either directly or indirectly do or cause to be done any act or thing which may in any way delay or prevent the issue of the Certificate of Fitness for Occupation by the Appropriate Authority and the Vendor shall not be liable to the Purchaser in any way whatsoever in such an event.

[7] In the present case, the plaintiffs contend that the defendant failed to deliver vacant possession of the unit that they had purchased in that the defendant failed to obtain a certificate of practical completion as required by cl 25 from their architect.

[8] The plaintiffs, however, accept that the defendant, subsequently, at a much later date, did manage to obtain a certificate of fitness on 2 October 2002.

[9] The defendant, on the other hand, argues that there was delivery of vacant possession on 2 January 1998 when on that day the defendant issued the plaintiffs with a letter (dated 2 January 1998) enclosing a document dated 22 December 1997 (exh L2 of encl 3) issued by their architect, Mr Chong Chen Kian of Atelier ADT Akitek Sdn Bhd. The defendant asserts that this document is a 'certificate of practical completion' in respect of the plaintiffs' unit as referred to by cl 25.1. The said letter of the defendant to the plaintiffs reads:

CHONG BY SAM
CHOO FONG YING
64 JALAN WAN EMPOK 2
SRI PETALING
57000 KUALA LUMPUR

Dear Sir/Madam

Re: HANDING OVER VACANT POSSESSION

Project: ENDAH PARADE

Phase: PHASE 3

Lot No: 1–071

Property Type: SHOPPING MALL

Selling Price: RM289,170.00

We are pleased to inform you the construction of the above mentioned unit purchased by you is now completed and the vacant possession of the unit is ready for delivery. A copy of the Architect Certificate of completion is enclosed herewith for your reference.

You are required to call at our office at the above address during office hours and within 14 days from the date hereof bringing along with you your payment for the amount of RM4,734.50 as per the statement of account attached.

If you are purchasing the unit by way of end financing, you are to note that prior to your calling at our office, please ensure that your end financier has paid the progress payment of RM14,458.50 to us and has also deposited 2.5% of the purchase price with our solicitors as a stakeholder.

Please note that upon the expiry of the 14 days from the date of this notice, you are deemed to have taken vacant possession of the above unit whether or not you have actually entered into possession or occupation of the unit and the 6 months defects liability period shall commence from this date.

Upon full settlement, you shall be issued a letter of clearance for the release of keys and be directed to EP Management Services Sdn Bhd for appointment on joint-inspection and collection of keys:-

Complex Management: EP Management Services Sdn Bhd

Tel No: 9579992 ext 13/306

Contact Person: Ms Wendy Chin

The delivery of vacant possession to you shall not give you the right to occupy or to carry out any variation work to the unit until such time the Certificate of Fitness for occupation for the unit has been issued by the authorities.

Thank you.

Yours faithfully,

SOON TIEK DEVELOPMENT SDN BHD

[signature]

AUTHORISED SIGNATORY

[10] The alleged 'Certificate of Practical Completion' (exh L2) that was enclosed with the above letter states as follows:

Atelier ADT

Akitek Sdn Bhd

(Company No. 157989-D)

22nd December 1997

KL(C)-158-93/PC(28)

SCHEDULE OF PAYMENT — Progress Payable

ITEM	STAGE OF COMPLETION	%	UNITS/LOT NO. COMPLETED	NO OF UNITS/ COMP DATE
1.	Immediately upon signing of this Agreement	10		
2.	Within fourteen (14) days from the Vendor's written notice of the completion of:-			

a.	the foundation and footing works of the Commercial Complex	10		
b.	The structural framework of the basement park	15		
c.	the structural frameworks of the said property	15		
d.	the electrical wiring (if any) and internal telephone trunking and cabling (if any) to the said property	15		
e.	the partition and / or internal / external wall of the said property	15		
f.	the internal and external plastering of the said property	10		
g.	the roads, drains and sewerage works serving the Commercial Complex 5	5		
3.	Upon handing over of vacant possession together with water pipes and electrical cabling ready for connection to the property	2.5	Grd Flr. All Completed (17 units);1st Flr. All Completed (119 units); 2nd Flr. All Completed (145 units); 3rd Flr. All Completed (120 units); 4th Flr. All Completed (71 units); 5th Flr. All Completed (11 units); 6th Flr. All Completed (1 unit).	484/
4.	On handing over of vacant possession as in item (3) and to be held by the Vender's Solicitors as stakeholder for payment to the Vender as follows:-			
a.	2..5 per centum (2..5%) at the expiry of six (6) months after handing over of vacant possession.	2.5		

ATELIER ADT AKITEK SDN BHD

[signature]

CHONG CHEN KIAN

[11] Having examined the above document issued by the architect dated 22 December 1997 (exh L2), I am in agreement with the plaintiffs' counsel's

submission that the above document is not a certificate of practical completion as envisaged by cl 25.1 of the agreement but merely, as the heading of the letter indicates, a schedule of progress payment. In my view, the certificate that is meant by cl 25.1 is a certificate issued by the architect that certifies that the unit purchased by the plaintiffs was practically completed. But when I scrutinise exh L2, I find that there is no certification to that effect. This means that there was no delivery of vacant possession on 2 January 1998 pursuant to cl 25.1. In the unreported judgment of Kang Hwee Gee J in *Liew Tuo Chee and others v Soon Teik Development Sdn Bhd* of 5 October 2005 in Originating Summons No S1–24–454 of 2005, the learned judge said:

> A certificate by an architect certifying practical completion must be a document that leaves no doubt on the face of the document that the construction of the building has been practically completed leaving no room for those who rely on it to say otherwise.

[12] Exhibit L2 was prepared by the defendant's architect. Indeed, it is a letter from the defendant's architect to the defendant. It is not even copied to the plaintiffs. In my judgment, in the instant case, since there is an ambiguity as to true nature of the document, then the document is to be construed in favour of the plaintiffs. There is a principle of construction applied by the Privy Council in *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 that says:

> Furthermore, there is a principle of construction that if a document inter parties contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

[13] To my mind, although the document before me is merely a letter and not an agreement (in *Kandasami* it was an agreement), there is a strong case to extend the above principle to the document at hand (exh L2). For in present case, the plaintiffs were neither the author of the letter (exh L2) nor the recipient of the same.

[14] The defendant, in trying to convince the court that the document is a certificate of practical completion as envisaged by cl 25.1, adduced an affidavit affirmed by the architect himself, Mr Chong Chen Kian (see encl 4). In his affidavit, Mr Chong confirmed that the document dated 22 December 1997 (exh L2) that was issued by him is a certificate of practical completion for the plaintiffs' unit as required by cl 25.1. With respect, I am not persuaded with such an assertion. This assertion is not supported by the content of the document itself. If the document is indeed a certificate of practical completion, why can't the certificate clearly say so in no uncertain

terms? On the evaluation of affidavit evidence, in the Privy Council case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, Lord Diplock had this to say (at p 217):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[15] The above dicta was quoted with approval by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14.

[16] The defendant, in support of the position that they take, also relies on *Sri Damansara Sdn Bhd v Liam Ahat Kiat @ Lim Pei Tiam* [1997] 3 MLJ 349. With respect, this case cited by the defendant can be distinguished. In *Seri Damansara*, the content of the document in question, unlike exh L2, is clear and unambiguous. It clearly states that the works had been completed and that it was possible for delivery of vacant possession to take place.

[17] It is also submitted by the defendant that the plaintiffs' claim is time barred by reason of s 6(1) of the Limitation Act 1953 as the plaintiffs' action, an action founded on a contract, was filed more than six years after the cause of action had accrued. Section 6(1) of the Limitation Act states:

> 6 Limitation of actions of contract and tort and certain other actions.
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;

[18] In the present case the originating summons was filed on 24 August 2006. To the defendant, the plaintiffs' cause of action accrued on 8 May 1999, that is, the due date for delivery of vacant possession. Thus there had been a delay of more than seven years. In support of their contention, the defendant relies on *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188. In this case that was cited the respondent/purchaser entered into a sale and purchase agreement on 12 December 1984 with the appellant/developer to purchase a single-storey dwelling house to be erected by the developer. By cl 18 of the agreement, it was provided that the developer should deliver vacant possession of the house to the purchaser

within 24 calendar months from the date of the agreement, failing which the developer should pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10%pa of the purchase price. The house was not completed and available for delivery until 25 March 1994, and that there had thus been a delay from 12 December 1986 until 25 March 1994 on the part of developer. The developer commenced proceedings by way of originating summons, issued on 31 July 1993, for declarations as to entitlement to the liquidated damages from 12 December 1986 to the date of delivery of possession of the house for breach of contract. The Federal Court held that the purchaser was seven months out of time and thus the purchaser's claim was statute-barred under s 6(1) of the Limitation Act.

[19] With respect, I am unable to accept the defendant's argument. Instead, I am in agreement with the plaintiffs that their cause of action accrued from the date of the obtaining of the certificate of fitness, that is, 2 October 2002, which certificate permits the plaintiffs to lawfully occupy the unit that they have purchased. In the present case, as delivery of vacant possession pursuant to cl 25.1 never took place at all, since a certificate of practical completion was never issue at all by the architect, I am compelled to hold that delivery of vacant possession took place only after the plaintiffs had been issued with a certificate of fitness, and this took place on 2 October 2002.

[20] The case of *Insun Development*, relied upon by the defendant, can be distinguished because the wording of cl 18 of the agreement in that case is not the same as the wording of cl 24 in our case. Clause 18 in *Insun Development*, reads:

> (1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[21] In that case Edgar Joseph Jr FCJ, in delivering the judgment of the Federal Court, said:

> The crucial question is: regard being had to the provisions of cl 18 of the agreement, when did the purchaser's right to sue for the agreed liquidated damages for the delay accrue?

It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mensah* [1971] 1 MLJ 32 at p 34; *Reeves v Butcher* [1891] 2 QB 509; *Gibbs v Guild* (1881–1882) 8 QBD 296 at p 302). But, parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner *as to postpone the date of accrual of their right to sue for damages which, of course, was what happened in Loh Wai Lian*.

(Emphasis added.)

[22] In distinguishing the earlier case of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 (a decision of the Privy Council), Edgar Joseph Jr FCJ in *Insun Development* said:

In the present context, we have to consider whether there is any, and if so what, material difference between the contract of sale in *Loh Wai Lian* and the agreement here.

The obvious difference between the contract of sale in *Loh Wai Lian* and the agreement here which we consider to be most material is this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the terminus a quo (the opening date) but also the terminus ad quem (the closing date), which was the date of actual completion and delivery of possession, whereas under the latter — it only specifies the terminus a quo but not the terminus ad quem. In our view, this difference is a matter of critical importance.

[23] Now, in *Loh Wai Lian*, the respondent/defendant, a licensed housing developer, had entered into a contract for the purchase of a shop house to be erected on a housing estate for RM175,000 payable by stage payments as the building proceeded. Clause 17 of the agreement stipulates that there should be delivery of vacant possession within 18 calendar months of the date of the agreement, failing which the vendor would be liable to pay to the purchaser agreed liquidated damages. The building was not completed on the due date of 18 September 1975, but possession was finally delivered on 7 November 1977. On 9 September 1982 the appellant/plaintiff filed a writ action against the respondent/defendant claiming liquidate damages, and applied for summary judgment. This is almost seven years after the due date of delivery of vacant possession (18 September 1975), but less that six years if the date of actual possession was taken (7 November 1977). In resisting the claim for liquidated damages, the defendant argued that the plaintiff's claim was statute-barred by s 6(1) of the Limitation Act as the plaintiff's/appellant's cause of action accrued on 18 September 1975 (the due date of delivery of vacant possession). The plaintiff/appellant succeeded before the senior assistant registrar. The defendant/respondent appeal to the judge in chambers, and the appeal was allowed. A further appeal by the appellant/plaintiff to the Federal Court was dismissed and the

appellant/plaintiff appealed to the Privy Council. The Privy Council held that the plaintiff's claim was not statute-barred, holding that time began to run only with effect from 7 November 1977 — the date of actual delivery of vacant possession.

[24] It is pertinent to observe that in *Loh Wai Lian*, cl 17 of the contract reads:

> Subject to cl 32 hereof and/or to any extension or extensions of time as may be allowed by the Controller the said building shall be completed and ready for delivery of possession to the purchaser within 18 calendar months from the date of this Agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the Vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

[25] In *Loh Wai Lian*, Lord Oliver of Anylmerton, in delivering the judgment of the Privy Council, said:

> But the description of the amount as 'liquidated damages' cannot in any event be determinative of the date on which the sum is to be payable. The clause has to be reasonably and sensibly construed. The obligation is introduced by the words 'the vendor shall pay' and there follows the calculation of the sum which he is to pay carefully defined by its opening and closing date.
>
> A construction which would import into the clause a fresh obligation on the vendor to pay the calculated amount at the end of each day would be capricious, involving as it does a series of breaches of contract as each day passes without payment being made. The whole tenor of the clause is, in the Lordship's view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot become due, because it cannot be ascertained, until the building has been completed and possession can be delivered. If the question is asked 'in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?', the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In Their Lordships' judgment, the only sensible construction of cl 17 is, as Mr Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for.

[26] In the present case, the relevant clause, that is, cl 24 reads:

24 Time for Handing Over of Vacant Possession

24.1 Subject always to any extension of time as may be allowed by the Project Architect or Project Engineer and provided that the Purchaser shall have paid to the Vendor all Installments of the Purchase Price and all and any other sums under this Agreement as and when due and payable, the Property, without any alterations and/or additions to the Property as stipulated in Clause 17 hereof shall be completed by the Vendor and vacant possession thereof shall be handed over to the Purchaser within thirty six (36) months from the date of this Agreement (hereinafter referred to as 'the said date').

24.2 If the Vendor fails to hand over vacant possession of the Property to the Purchaser on the said Date, the Vendor shall pay to the Purchaser agreed liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on such portion of the Purchase Price of the Property as the Purchaser shall have paid to the Vendor from the said Date to the date of the Notice from the Vendor to the Purchaser requesting the Purchaser to take vacant possession of the Property to be computed and paid by the Vendor after completion of the Property and after payment of the full Purchase Price by the Purchaser. The Purchaser hereby acknowledges that save for the provisions contained herein the Purchaser shall not be entitled to any rights or remedies against the Vendor for whatsoever loss suffered by the Purchaser resulting from such delay.

[27] In the present case, cl 24, is quite similar to cl 17 of the agreement in *Loh Wai Lian,* as compared to cl 18 of the agreement in *Insun Development*. I say that the two clauses are quite similar in the sense that both clauses (that is, cl 24 of the agreement in the present case and cl 17 of the agreement in *Loh Wai Lian*) there is an 'opening date' (*terminus a quo*) as well as a 'closing date' (*terminus ad quem*); whereas in cl 18 of the agreement in *Insun Development*, there was only an opening date but there was no closing date. As such, I am bound by the decision in *Loh Wai Lian* rather than the decision in *Insun Development*.

Application allowed with costs.

Reported by K Nesan